84-1400

No. ____

Office - Supreme Court, U.S.
FILED
MAR 5 1985
ALEXANDER L. STEVAS.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RAYMOND J. DONOVAN, Petitioner

v.

MARIO MEROLA, District Attorney, Bronx County, New York, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, DIVISION FOR THE PURPOSE OF APPOINTING COUNSEL, ETHICS IN GOVERNMENT ACT OF 1978

WILLIAM O. BITTMAN
Counsel of Record
PIERSON, BALL & DOWD
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 331-8566

PAUL J. CURRAN
BRUCE MARGOLIUS
KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 Park Avenue
New York, New York 10022
(212) 407-8000

Attorneys for Petitioner

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsel, Ethics in Government Act of 1978 has jurisdiction to order, *ex parte*, disclosure of grand jury materials that are not portions of a Special Prosecutor's report, in apparent violation of 28 U.S.C. § 595(b)(3).

2. Whether the United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsel, Ethics in Government Act of 1978 may order, *ex parte*, disclosure of federal grand jury materials without requiring the applicant for such materials to make a showing of compelling necessity or particularized need.

STATEMENT PURSUANT TO SUPREME COURT RULES 21 AND 28.1

The following parties may have an interest in the outcome of this proceeding:

Raymond J. Donovan
Schiavone Construction Company
Ronald A. Schiavone
Richard C. Callaghan
Joseph A. DiCarolis
Morris J. Levin
Albert J. Magrini
Gennaro Liguori
Robert Genuario
Jopel Contracting and Trucking Corporation
Joseph L. Galiber
William P. Masselli
Hon. Mario Merola, District Attorney, Bronx County, New York
United States Department of Justice
Hon. Leon Silverman, Former Special Prosecutor

All of the above parties have been served with copies of this petition.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
STATEMENT PURSUANT TO SUPREME COURT RULES 21 AND 28.1	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	7
PRELIMINARY STATEMENT:	
CERTIORARI SHOULD BE GRANTED TO RESOLVE THE APPARENT CONFLICT BETWEEN RULE 6(E) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND THE ETHICS IN GOVERNMENT ACT	7
I. THE SPECIAL COURT LACKED JURISDICTION TO ORDER DISCLOSURE OF MATTERS OCCURRING BEFORE A FEDERAL GRAND JURY	9
II. THE BRONX DISTRICT ATTORNEY'S APPLICATIONS AND THE SUBSEQUENT DISCLOSURES VIOLATED RULE 6(E)	11
A. The Bronx District Attorney's Applications Were Procedurally Defective Under Rule 6(e)	11
B. The Bronx District Attorney Failed to Make a Sufficient Showing of Necessity to Warrant Disclosure of Grand Jury Materials	14
CONCLUSION	18

TABLE OF AUTHORITIES

Cases	PAGE
Douglas Oil Company v. Petrol Stops Northwest, 441 U.S. 211 (1979)	11, 13, 14
Robert Hawthorne, Inc. v. Director of Internal Revenue, 406 F. Supp. 1098 (E.D. Pa. 1976)	15
Illinois v. Abbott & Associates, Inc., 460 U.S. 557 (1983)	12
Illinois v. Sarbaugh, 552 F.2d 768 (7th Cir.), *cert. denied*, 434 U.S. 889 (1977)	13
In re Doe, 537 F. Supp. 1038 (D.R.I. 1982)	13
In re Grand Jury Investigation, 414 F. Supp. 74 (S.D.N.Y. 1976)	16
In re Grand Jury Investigation of Cuisinarts, Inc., 665 F.2d 24 (2d Cir. 1981), *cert. denied*, 460 U.S. 1068 (1983)	12
In re Grand Jury Investigation No. 78-184 (Sells, Inc.), 642 F.2d 1184 (9th Cir. 1981), *aff'd sub nom., United States v. Sells Engineering, Inc.*, ____ U.S. ____, 103 S. Ct. 3133 (1983)	11, 13
In re Grand Jury Matter, 495 F. Supp. 127 (E.D. Pa. 1980)	13
In re Grand Jury, September 20, 21, 22, and 25, 1967, 82 F.R.D. 70 (N.D. W. Va. 1979)	15
In re June 20, 1977 Concurrent Grand Jury Investigation (J. Ray McDermott & Company), 622 F.2d 166 (5th Cir. 1980)	15
United States v. Baggot, ____ U.S. ____, 103 S. Ct. 3164 (1983)	16

PAGE

United States v. Procter & Gamble Company, 356 U.S. 677 (1958) 11, 14, 15

United States v. Rose, 215 F.2d 617 (3d Cir. 1954) 11

United States v. Sells Engineering, Inc., ____ U.S. ____, 103 S. Ct. 3133 (1983) 11, 12

United States v. Sobotka, 623 F.2d 764 (2d Cir. 1980) .. 16

Statutes

28 U.S.C. § 49 (1982) 2, 9

Ethics in Government Act, 28 U.S.C. §§ 591-98 (1982) . 2, 5, 7, 9

Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 215, 98 Stat. 1837, 2016-17 (1984) 12

Rule 6(e), Federal Rules of Criminal Procedure ..... *passim*

N.Y. Crim. Proc. Law §§ 670.10, 670.20 (McKinney 1984) 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. ____

IN RE:

SECRETARY OF LABOR
RAYMOND J. DONOVAN,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, DIVISION FOR THE PURPOSE OF APPOINTING INDEPENDENT COUNSEL, ETHICS IN GOVERNMENT ACT OF 1978

OPINIONS BELOW

This petition for a writ of *certiorari* seeks review by this Court of orders of the United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsel, Ethics in Government Act of 1978 (the "Special Court")[1] that were entered without opinion. Such orders are attached hereto as appendices A through E.

1 Effective January 3, 1983 the Special Court's title and mandate were changed by, *inter alia*, substitution of the words "independent counsel" for "special prosecutor." Pub. L. 97-409, 97 Stat. 3537, 3555 (1982).

JURISDICTION

The Order of the Special Court to which this petition is addressed was entered on December 5, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Federal statutory provisions involved are:

28 U.S.C. § 49(f):

> *§ 49 Assignment of judges to division to appoint independent counsels*
>
> (f) Except as otherwise provided in chapter 39 of this title, no member of such division of the court who participated in a function conferred on the division under chapter 39 of this title involving a[n] independent counsel shall be eligible to participate in any judicial proceeding concerning a matter which involves such independent counsel while such independent counsel is serving in that office or which involves the exercise of such independent counsel's official duties, regardless of whether such independent counsel is still serving in that office.

The Ethics in Government Act, 28 U.S.C. § 595(b)(3):

> *§ 595 Reporting and Congressional Oversight*
>
> (b)(3) The division of the court may release to the Congress, the public, or to any appropriate person, such portions of a report made under this subsection as the division deems appropriate. The division of the court shall make such orders as are appropriate to protect the rights of any individual named in such report and to prevent undue interference with any pending prosecution. The division of the court may make any portion of a

report under this section available to any individual named in such report for the purposes of receiving within a time limit set by the division of the court any comments or factual information that such individual may submit. Such comments and factual information, in whole or in part, may in the discretion of such division be included as an appendix to such report.

and Rule 6(e)(3) of the Federal Rules of Criminal Procedure:

Rule 6. The Grand Jury

(e) Recording and Disclosure of Proceedings.

(3) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding;

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury; or

(iii) when the disclosure is made by an attorney for the government to another federal grand jury.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

(D) A petition for disclosure pursuant to subdivision (e)(3)(C)(i) shall be filed in the district where the grand jury convened. Unless the hearing is *ex parte*, which it may be when the petitioner is the government, the petitioner shall serve written notice of the petition upon (i) the attorney for the government, (ii) the parties to the judicial proceeding if disclosure is sought in connection with such a proceeding, and (iii) such other persons as the court may direct. The court shall afford those persons a reasonable opportunity to appear and be heard.

(E) If the judicial proceeding giving rise to the petition is in a federal district court in another district, the court shall transfer the matter to that court unless it can reasonably obtain sufficient knowledge of the proceeding to determine whether disclosure is proper. The court shall order transmitted to the court to which the matter is transferred the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand jury secrecy. The court to which the matter is transferred shall afford the aforementioned persons a reasonable opportunity to appear and be heard.

STATEMENT OF THE CASE

United States Secretary of Labor Raymond J. Donovan ("Secretary Donovan") moved before the Special Court[2] for an order vacating prior *ex parte* orders of that Court entered on November 12, 1982 (A3-5)[3], February 27, 1984 (A7-12), July 30, 1984 (A13-15), and August 17, 1984 (A17) (the "disclosure orders"), which permitted disclosure to the District Attorney of Bronx County, New York of materials constituting matters occurring before a federal grand jury.

The grounds for such motion were that the disclosure orders were granted in violation of 28 U.S.C. §§ 593, 595, and in violation of Rule 6(e) of the Federal Rules of Criminal Procedure in that the Special Court had no jurisdiction to order disclosure of grand jury materials that were not part of Special Prosecutor Silverman's report, that the applications for such orders were made *ex parte*, without proper notice to Secretary Donovan or other interested individuals, and that the Bronx District Attorney failed adequately to demonstrate compelling necessity or particularized need for disclosure of the grand jury materials.

This petition seeks review of the Special Court's denial of Secretary Donovan's motion.

On September 24, 1984, a Bronx County, New York grand jury returned a 137-count indictment against Secretary Donovan and 11 other defendants (the "Bronx indictment"). In the course of that grand jury investigation, the Bronx County District Attorney's office obtained access to the files and records of Special Prosecutor Silverman, including exten-

---

2 Secretary Donovan was the subject of an investigation by Special Prosecutor Leon Silverman, who was appointed by the Special Court on December 29, 1981. In connection with this investigation, a grand jury was empanelled on February 1, 1982 in the Eastern District of New York. The Special Prosecutor concluded that there was no credible evidence to support any allegation against Secretary Donovan.

3 References (A____) are to the appendix herein.

sive testimony before the federal grand jury empanelled in the Eastern District of New York. (Curran Aff. at ¶¶ 18-20)[4] (A23)

The Bronx County District Attorney's office obtained such access through four applications made under oath to the Special Court. Secretary Donovan, the other defendants, and their respective counsel received no notice and had no knowledge of these applications or of the ensuing orders until on or after August 29, 1984. (Curran Aff. at ¶ 14) (A22) The Bronx indictment, as well as the voluntary disclosure forms accompanying it, indicated that the Bronx grand jury placed substantial reliance upon the federal grand jury materials obtained pursuant to the Special Court's orders.[5] (Curran Aff. at ¶ 18) (A23)

In a motion filed with the Special Court on October 22, 1984 Secretary Donovan sought to obtain the moving papers filed by the Bronx County District Attorney and the Special Court's orders granting or denying such motions. (Curran Aff. at ¶ 19) (A23)

In an order entered on November 19, 1984 the Special Court granted such motion, ordering production to Secretary Donovan of copies "of all moving papers filed by the Bronx County District Attorney's office in support of its applications for access to the files and records of Special Prosecutor Leon Silverman and of the orders of this Division entered upon such applications."

On November 21, 1984 former Special Prosecutor Silverman, pursuant to the Special Court's order of November 19,

---

4 References are to the affidavit of Paul J. Curran, dated November 26, 1984, attached hereto as appendix F (A19-27).

5 Subsequently, the record of the Bronx grand jury was ordered disclosed to the defendants, and that record revealed that numerous excerpts from the record of the federal grand jury had been read by the prosecutors to the Bronx grand jury. Such disclosure was made subsequent to the Special Court's order of December 5, 1984 and, consequently, is not part of the record herein. The record of the Bronx grand jury reflects highly selective and prejudicial use of the federal grand jury materials.

produced to Secretary Donovan's lawyers copies of the four orders and underlying applications for the disclosure sought by the Bronx District Attorney of "investigatory records procured or generated during the investigation by the special prosecutor herein which are now in the custody of the Court." (A3) Upon their face, such orders plainly call for production of the grand jury testimony of numerous witnesses. In some cases, the orders call for excerpts from grand jury testimony; in other cases, they call for the production of the *entire* grand jury testimony of certain witnesses. *See, e.g.*, Order of November 12, 1982, items 4-11 (A4), Order of February 27, 1984, items 3, 4, 6, 7-9, 11, 13. (A7-8)

On November 28, 1984, Secretary Donovan moved in the Special Court for an order vacating the disclosure orders and requiring return of all such grand jury materials to the Clerk of the Special Court. Secretary Donovan's motion was denied by the Special Court, without opinion, in an order entered on December 5, 1984. (A1)

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE APPARENT CONFLICT BETWEEN RULE 6(e) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND THE ETHICS IN GOVERNMENT ACT

PRELIMINARY STATEMENT

As will be set forth more fully below, this case arises from an apparent conflict between the requirements of Rule 6(e) of the Federal Rules of Criminal Procedure regarding grand jury secrecy and certain provisions of the Ethics in Government Act, contained in 28 U.S.C. § 595(b)(3), which permit the Special Court to release "to any appropriate person" "portions" of a Special Prosecutor's confidential report to the Special Court.

While Rule 6(e) and the holdings of this and other courts construing it require that a person wishing to obtain grand jury transcripts and other materials make certain showings, including that such materials are sought to prevent an injustice preliminarily to or in connection with a judicial proceeding and that the applicant has a compelling necessity or particularized need for the disclosure of such materials, the Ethics in Government Act contains no such safeguards. To the extent, therefore, that grand jury materials are "portions" of the Special Prosecutor's report, it is necessary for this Court to grant *certiorari* in order to assure that all federal courts, including the Special Court, apply the same standards to a request for disclosure of grand jury materials.

More importantly, the present case arises in large part from *ex parte* disclosure by the Special Court of grand jury materials that were *not*, in fact, *portions* of the Special Prosecutor's report for, they were neither contained in nor made a part of the report. As will be demonstrated more fully below, such disclosures exceeded the jurisdiction of the Special Court. The grand jury whose record is at issue here was empanelled by the United States District Court for the Eastern District of New York, and it is that Court before which the Bronx District Attorney was obliged to make his application for disclosure of grand jury materials.

It is necessary, then, for this Court to grant *certiorari* in order that it may decide, for the first time, two critically important issues: First, whether the Special Court has jurisdiction to order, *ex parte*, disclosure of grand jury materials that are not portions of a Special Prosecutor's report, irrespective of the showing made by the applicant; and, second, whether the Special Court erred in not requiring a showing of compelling necessity or particularized need with regard to disclosure of federal grand jury materials.

It would appear that investigations by Special Prosecutors or Independent Counsel have become a permanent part of the operation of the federal government. Moreover, the decisions

of the Special Court, since it is a division of the District of Columbia Circuit, are apparently reviewable *only* by this Court. It is important, then, that this Court grant *certiorari* so that it may provide guidance to the Special Court and so that the lack of jurisdiction of the Special Court to act on matters not specifically addressed in Chapter 39 of Title 28 can be made clear.

POINT I

THE SPECIAL COURT LACKED JURISDICTION TO ORDER DISCLOSURE OF MATTERS OCCURRING BEFORE A FEDERAL GRAND JURY

The Special Court was created by and exists pursuant to 28 U.S.C. § 49. That statute expressly provides that no member of the Special Court shall be eligible to participate in a judicial proceeding concerning any matter relating to a Special Prosecutor or an investigation with respect to which that member has functioned, except for matters specifically set forth in Chapter 39 of Title 28. 28 U.S.C. § 49(f)(1982). Thus, if the Special Court or its individual members are to hear and pass upon applications such as the one made by the Bronx District Attorney, express authority to do so must be found in Chapter 39, or not at all.

The only arguably applicable provision in Chapter 39 is 28 U.S.C. § 595(b)(3), which is specifically directed to *portions* of the Special Prosecutor's confidential *report* to the Special Court. It therefore follows that the Special Court has, as a practical matter, jurisdiction to disclose *only* such portions of that report as are not published in the public version. The Special Court, then, by the plain meaning of the statute, has no jurisdiction over grand jury materials created by the Special Prosecutor during his investigation, but not included in the confidential report.

The only authoritative source for determining which materials are portions of the confidential report and which are not

is the unredacted report itself, to which Secretary Donovan has not had full access. The disclosed grand jury materials, however, far exceeded those that have been made part of the report.[6] (Curran Aff. at ¶ 22) (A24)

As demonstrated above, the Special Court has jurisdiction only over portions of the Special Prosecutor's report and has no jurisdiction over grand jury materials that were not included in and made a part of such report. Moreover, it is plain from Rule 6(e)(3)(D) that an application for access to grand jury materials (the requirements of which will be discussed in detail in Point II below), *must* be filed in the district where the grand jury in question was convened. Since the grand jury materials in question were obtained from a grand jury in the Eastern District of New York, it is plain that, pursuant to Rule 6(e)(3)(D), only the United States District Court for the Eastern District of New York has jurisdiction to hear an initial application for disclosure of these grand jury materials.

For the reasons stated above, the Special Court was without authority to order disclosure of matters occurring before a grand jury convened in the Eastern District of New York, except to the extent that such materials were specifically made part of the Special Prosecutor's report. Consequently, the orders granting disclosure of grand jury materials were due to be vacated, and a writ of *certiorari* should be granted to review and reverse the Special Court's denial of Secretary Donovan's motion.

---

6 This was confirmed to counsel by Special Prosecutor Silverman.

POINT II

THE BRONX DISTRICT ATTORNEY'S APPLICATIONS AND THE SUBSEQUENT DISCLOSURES VIOLATED RULE 6(e)

A. The Bronx District Attorney's Applications Were Procedurally Defective Under Rule 6(e)

It is the general rule that matters occurring before a grand jury are to remain secret. Fed. R. Crim. P. 6(e)(2). This Court has consistently held that the proper functioning of the grand jury system depends upon adherence to this general rule of secrecy. *See, e.g., United States* v. *Sells Engineering, Inc.*, ___ U.S. ___, 103 S. Ct. 3133, 3137-38 (1983);[7] *Douglas Oil Company* v. *Petrol Stops Northwest*, 441 U.S. 211 (1979); *United States* v. *Procter & Gamble Company*, 356 U.S. 677, 681-82 & n.6 (1958). One important purpose of this policy of secrecy is the protection of the innocent. *United States* v. *Procter & Gamble Company*, 356 U.S. at 681-682 n.6 (quoting *United States* v. *Rose*, 215 F.2d 617, 628-29 (3d Cir. 1954)). In the present case, Secretary Donovan has been investigated thoroughly and the Special Prosecutor has found insufficient evidence to indict. Thus, it is clear that Secretary Donovan and the other witnesses before the federal grand jury are fully

---

7 Sells was a case, like this one, that arose after the disclosures were made. There, the government argued that the matter was moot because of the prior disclosure. The Court of Appeals, however, held in language quoted approvingly by this Court:

> The controversy here is still a live one. By its terms the disclosure order grants access to all attorneys for the Civil Division, their paralegal and secretarial staff, and all other necessary assistants. Each day this order remains effective the veil of secrecy is lifted higher by disclosure to additional personnel and by the continued access of those to whom the materials have already been disclosed. We cannot restore the secrecy that has already been lost but *we can grant partial relief by preventing further disclosure.*

United States v. Sells Engineering, Inc., 103 S. Ct. at 3137 n.6 (quoting In re Grand Jury Investigation, No. 78-184 (Sells, Inc.), 642 F.2d 1184, 1187-88 (9th Cir. 1981)) (emphasis added).

entitled to all the protections afforded by the policy of grand jury secrecy.[8]

In order to assure that matters occurring before a grand jury are not lightly disclosed, the only possible grounds for disclosure of such matters are those set forth in Rule 6(e)(3)(C).[9] *United States* v. *Sells Engineering*, 103 S.Ct. at 3137. Since the Bronx District Attorney was not presenting his case to another *federal* grand jury and since the disclosure was plainly not sought by a defendant, the only applicable ground for disclosure is Rule 6(e)(3)(C)(i), which provides for disclosure

> "when so directed by a court preliminarily to or in connection with a judicial proceeding."

The procedural requirements for a petition for disclosure pursuant to Rule 6(e)(3)(C)(i) are set forth in Rule 6(e)(3)(D), which provides that,

> "A petition for disclosure pursuant to subdivision (e)(3)(C)(i) shall be filed in the district where the grand jury convened. Unless the hearing is *ex parte*, which it may be when the petitioner is the government, the petitioner shall serve written notice of the petition upon (i) the attorney for the government, (ii) the parties to the judicial proceeding if disclosure is sought in connection with such a proceeding, and (iii) such other persons as the court may direct. The court shall afford those persons a reasonable opportunity to appear and be heard."

---

8 This is particularly true where, as here, the Bronx County charges against Secretary Donovan and others are predicated upon the same facts that Special Prosecutor Silverman investigated thoroughly and found constituted no basis to indict anyone.

9 A recent amendment to Rule 6(e)(3)(C), passed as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 215, 98 Stat. 1837, 2016-17 (1984), specifically addresses disclosures to local prosecutors, beginning January 1, 1986. The passage of this amendment demonstrates that, until its effective date, state prosecutors are bound by the current requirements of Rule 6(e)(3)(C). *Cf.* Illinois v. Abbott & Associates, Inc., 460 U.S. 557, 572-73 (1983); In re Grand Jury Investigation of Cuisinarts, Inc., 665 F.2d 24, 36 (2d Cir. 1981), *cert. denied*, 460 U.S. 1068 (1983).

This portion of the Rule was recently added for the express purpose of requiring all applicants for access to grand jury materials (other than, in some circumstances, the federal government) to proceed on notice to all potentially interested parties. *See* Notes of Advisory Committee on Rules, 1983 Amendment. The intent of this amendment is clear:

> "The second sentence requires the petitioner to serve notice of his petition upon several persons who, by the third sentence, are recognized as entitled to appear and be heard on the matter. The notice requirement ensures that all interested parties, if they wish, may make a timely appearance. Absent such notice, these persons, who then might only learn of the order made in response to the motion after it was entered, have had to resort to the cumbersome and inefficient procedure of a motion to vacate the order." Notes of Advisory Committee on Rules, 1983 Amendment.

This 1983 amendment was, in effect, an enactment of a judicially created "preference for adversariness over *ex parte*-ness whenever that can be reasonably achieved." *In re Grand Jury Matter*, 495 F. Supp. 127, 134 (E.D. Pa. 1980). *See also In re Grand Jury Investigation No. 78-184 (Sells, Inc.)*, 642 F.2d 1184, 1192 (9th Cir. 1981), *aff'd sub nom., United States v. Sells Engineering, Inc.*, ____ U.S. ____, 103 S. Ct. 3133 (1983); *Illinois v. Sarbaugh*, 552 F.2d 768, 773 (7th Cir.), *cert. denied*, 434 U.S. 889 (1977); *In re Doe*, 537 F. Supp. 1038, 1041-42 (D.R.I. 1982). Moreover, without expressly addressing the question of the propriety of an *ex parte* application, this Court has, at least by inference, disapproved it. *Douglas Oil Company*, 441 U.S. at 218 n.8.

Thus, even assuming, *arguendo*, that the Bronx grand jury investigation was a "judicial proceeding" within the meaning of the rule[10] it was patently improper for any court, even the

---

10 None of the Bronx County District Attorney's applications to the Special Court make any showing whatsoever to meet this threshold requirement. Indeed, Secretary Donovan is not even mentioned in these applications. Thus, it is plain that, at least with respect to Secretary Donovan, the applications did not pass muster on this basis alone.

one that has jurisdiction over the grand jury materials, to entertain a petition for disclosure unless notice was given to Secretary Donovan, who was the object of the Special Prosecutor's investigation and who was also a target of the Bronx grand jury, which indicted him on September 24, 1984.

B. The Bronx District Attorney Failed to Make a Sufficient Showing of Necessity to Warrant Disclosure of Grand Jury Materials

In a case where a party seeks disclosure of matters occurring before a grand jury, *that party* bears the burden of demonstrating that such disclosure is both proper and necessary. *Douglas Oil Company* v. *Petrol Stops Northwest*, 441 U.S. at 222:

> "From *Procter & Gamble* and *Dennis* emerges the standard for determining when the traditional secrecy of the grand jury may be broken: Parties seeking grand jury transcripts under Rule 6(e) must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed." (footnote omitted).

This requirement has also been described as imposing upon the moving party the burden of showing "compelling necessity" or "particularized need" for the grand jury materials he seeks. *United States v. Procter & Gamble Company*, 356 U.S. at 683.

In order to demonstrate such compelling necessity or particularized need, the party seeking grand jury materials must show that the grand jury materials sought are needed for very specific purposes, and that such needs cannot otherwise be met:

> "Merely showing that the testimony contained in the transcript is relevant and useful in a civil action does not appear sufficient to counter the public policy of secrecy of Grand Jury proceedings. The Legislative History, citing

> *United States* v. *Procter & Gamble*, *supra*, and *Robert Hawthorne, Inc. v. Director of Internal Revenue Service*, 406 F. Supp. 1098 (E.D. Pa. 1976), reflects the standards necessary for the lifting of the secrecy of Grand Jury proceedings and in those cases of particularized need, the secrecy of the Grand Jury proceedings is lifted by disclosure *in a discreet and limited manner.*" *In re Grand Jury, September 20, 21, 22, and 25, 1967*, 82 F.R.D. 70, 73 (N.D. W. Va. 1979). (emphasis added).

Where, as in the present case, the movant requested disclosure of *entire* grand jury transcripts of numerous individuals and provided the Special Court with virtually no details about the investigation that the Bronx grand jury was conducting, this test is plainly not met. The Special Court was never given sufficient information to make the discreet and limited disclosure of grand jury materials required in order to carefully tailor the disclosure to the purpose for which it is requested. *See In re June 20, 1977 Concurrent Grand Jury Investigation (J. Ray McDermott & Company)*, 622 F.2d 166, 172 (5th Cir. 1980).

Indeed, even in the last application filed with the Special Court, the Bronx District Attorney stated, under oath, only that the materials were sought in connection with an investigation of the murder of Salvatore Frascone. (Affidavit of Stephen R. Bookin, August 10, 1984) This affidavit was sworn to a mere 19 days *before* Secretary Donovan's counsel was first told of the Bronx County grand jury investigation and 10 days *after* Messrs. Bookin and Merola swore to the District Court for the Southern District of New York that their grand jury investigation involved Secretary Donovan's former employer, Schiavone Construction Company, and certain of its officers. (Curran Aff. at ¶¶ 26, 27) (A25-26) Thus, it would appear that the Bronx District Attorney affirmatively misled the Special Court as to the nature of the "judicial proceeding" in connection with which disclosure of grand jury materials was sought. Even if the Bronx District Attorney's disclosure applications

were facially sufficient, which they were not, the Special Court should have, upon Secretary Donovan's motion, vacated its prior orders in light of this apparent misrepresentation.

Disclosure must be denied when the "judicial proceeding" in connection with which disclosure is sought is speculative or remote because the mandatory analysis of particularized need "cannot even be made without consideration of the particulars of the judicial proceeding with respect to which disclosure is sought." *United States* v. *Baggot*, ____ U.S. ____, 103 S. Ct. 3164, 3167 n.4 (1983) (citations omitted). *A fortiori*, the analysis cannot and could not be made correctly when the judicial proceeding was misrepresented to the Special Court. Thus, it is plain that the Bronx District Attorney's application was insufficient as a matter of law and that the Special Court—even if it had jurisdiction—failed both initially and upon Secretary Donovan's motion properly to balance the need for grand jury secrecy against the need for disclosure.

The court determining a motion for disclosure must also inform itself fully as to the *use* the applicant seeks to make of the grand jury materials, not only so that it may determine whether there is particularized need but also in order to limit, to the greatest extent possible, the scope of the disclosure. This process generally requires that the requested grand jury materials be unavailable to the applicant by any other means. *See, e.g., In re Grand Jury Investigation*, 414 F. Supp. 74 (S.D.N.Y. 1976).

For example, in *United States* v. *Sobotka*, 623 F.2d 764 (2d Cir. 1980), the Second Circuit reversed an order of the district court disclosing grand jury testimony to the Grievance Committee of the Windham County [Connecticut] Judicial District. The Court of Appeals found that there had been no showing of particularized need both because the Committee was not sufficiently specific about the information sought and, more significantly in the context of the present case, because the committee had "subpoena powers and can compel testimony in relation to

any matter deemed by the Committee to be relevant to its inquiry or investigation." *Id.* at 768.

In the present case, the Bronx District Attorney chose to use federal grand jury testimony rather than to subpoena certain witnesses. This is not only improper under Rule 6(e), but also under New York law, which says that a prosecutor may not introduce prior sworn testimony into the record of a grand jury unless he has first made reasonably diligent efforts to secure the attendance of the witness. N.Y. Crim. Proc. Law §§ 670.10, 670.20 (McKinney 1984). No such efforts were ever made.

In sum, the requisite showing of compelling necessity or particularized need was never made and, indeed, it could never have been made. The Special Court, however, apparently applied the wrong standard—if it applied any standard at all—and ordered disclosure of federal grand jury records in utter disregard of Rule 6(e). This error, standing alone, compels this Court to grant *certiorari* so that the orders of the Special Court may be reversed.

CONCLUSION

For the reasons stated above, this petition for a writ of *certiorari* should be granted.

Dated: March 5, 1985

Respectfully submitted,

William O. Bittman
Counsel of Record
PIERSON, BALL & DOWD
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 331-8566

Paul J. Curran
Bruce Margolius
KAYE, SCHOLER, FIERMAN
HAYS & HANDLER
425 Park Avenue
New York, New York 10022
(212) 407-8000

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division for the Purpose of
Appointing Independent Counsel
Ethics in Government Act of 1978

In Re: Secretary of Labor
Raymond J. Donovan

September Term 1984
No. 81-2

Before: Robb, *Senior Circuit Judge,* Presiding, Morgan, *Senior Circuit Judge* and Mansfield*, *Senior Circuit Judge*

ORDER

Upon consideration of the motion filed by Secretary Donovan requesting this court to vacate its various orders authorizing the disclosure of specified documents and materials to the Bronx County District Attorney and to require the latter to return same to this Division, and of the record herein and the various pleadings and communications submitted with respect to the disclosure of materials, it is

ORDERED, by the Court, that Secretary Donovan's motion to vacate the Division's various orders authorizing disclosure of documents is denied.

Per Curiam

For the Court:

/s/ GEORGE A. FISHER
George A. Fisher, *Clerk*

DATED: Washington, D.C.

* Senior Circuit Judge Mansfield did not participate in the foregoing order.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division for the Purpose of
Appointing Special Prosecutors
Ethics in Government Act of 1978

In Re: Secretary of Labor
Raymond J. Donovan No. 81-2

Before: Robb, *Senior Circuit Judge*, Presiding, Lumbard, *Senior Circuit Judge*, and Morgan, *Senior Circuit Judge*

ORDER

Upon consideration of the application of James F. Shalleck, Esquire, Assistant District Attorney, Bronx County, New York, filed herein November 5, 1982, it is by the Court

ORDERED, pursuant to 28 U.S.C. §592(d)(1), that disclosure may be made to James F. Shalleck, Assistant District Attorney, of investigatory records procured or generated during the investigation by the Special Prosecutor herein which are now in the custody of the Court, as follows:

1. Tape recordings and transcripts, if any, of the four telephone conversations of May 12, 14, 17 and 19, 1982, between Nat Masselli and Morris J. Levin referred to at p. 564 of volume 2 of the redacted version of the Report of the Special Prosecutor (the "Report");

2. Excerpts from Morris J. Levin's grand jury testimony, if any, relating to: (a) the telephone conversations referred to in item 1, *supra*; (b) a meeting with William Masselli in December 1981; (c) Philip Buono; and (d) Joseph Verlezza;

3. Excerpts from William Masselli's grand jury testimony, if any, relating to: (a) a meeting with Morris Levin in December 1981; (b) Philip Buono; (c) Joseph Verlezza; and (d) Exhibit 62 to the Report (the "Di Carolis paper" referred to, among other places, at p. 508 of volume 2 of the Report);

4. Philip Buono's grand jury testimony;

5. Joseph Verlezza's grand jury testimony;

6. Nat Masselli's grand jury testimony, if any;

7. Excerpts from the grand jury testimony of Robert DeFilippis, if any, relating to: (a) William Masselli; (b) Nat Masselli; (c) Jopel; (d) Joseph Galiber; (e) Philip Buono; and (f) Joseph Verlezza;

8. Excerpts from Joseph DiCarolis' grand jury testimony, if any, relating to: (a) William Masselli; (b) Jopel; and (c) the DiCarolis paper;

9. Excerpts from Ronald Schiavone's grand jury testimony, if any, relating to: (a) William Masselli; (b) Jopel; (c) Philip Buono; and (d) Joseph Verlezza;

10. Joseph Galiber's grand jury testimony;

11. Excerpts from the grand jury testimony of Albert Magrini, if any, relating to: (a) William Masselli; (b) Jopel; (c) Philip Buono; and (d) Joseph Verlezza;

12. Ledger sheets reflecting Schiavone Construction Company advances to, and repayment by, Jopel, including S.P. nos. 352066-7 and 352122-40;

13. Excerpts from the testimony of Raymond J. Donovan relating to: (a) William Masselli; (b) Jopel; (c) Philip Buono; and (d) Joseph Verlezza;

14. Excerpts from the testimony of Gennaro Liguori relating to: (a) William Masselli; (b) Jopel; (c) Philip Buono; and (d) Joseph Verlezza; and it is

FURTHER ORDERED that James F. Shalleck, Assistant District Attorney, shall make no disclosure of the contents of these records except to members of a duly constituted grand jury in Bronx County, New York, and such government personnel as are deemed necessary by the Bronx County District Attorney in the investigation of this matter, the presentation of evidence before a grand jury, and the enforcement of the criminal laws of New York State.

Per Curiam

For the Court:

/s/ GEORGE A. FISHER

George A. Fisher, *Clerk*

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division for the Purpose of
Appointing Independent Counsel
Ethics in Government Act of 1978

In Re: Secretary of Labor
Raymond J. Donovan

September Term 1981
No. 81-2

Before: Robb, *Senior Circuit Judge,* Presiding, Lumbard, *Senior Circuit Judge* and Morgan, *Senior Circuit Judge*

ORDER

Upon the application of Stephen R. Bookin, Assistant District Attorney, Bronx County, New York, and for good cause shown, it is

ORDERED, by the Court, that Leon Silverman, former Special Prosecutor in the captioned proceeding be, and he is hereby, authorized to furnish to the District Attorney of Bronx County, New York, access to the following investigatory records procured or generated during his investigation:

1. The unredacted interview of Louis R. Nargi by agents of the FBI on February 9, 1980 and February 12, 1980, nine pages, referred to in the Report of the Special Prosecutor (the *Report*) as Exhibit 64 and referred to at pp. 534-537.

2. The interview of Louis R. Nargi by agents of the Special Prosecutor on February 24, 1982, referred to in the *Report* at pp. 93-94, 537 ftnt. 402 "[MATERIAL DELETED.]", 538-540.

3. The grand jury testimony (Immunized) by Louis R. Nargi on March 10, 1982, referred to in the *Report* at pp. 94-95, 540 "[*Grand Jury Material Deleted.*]."

4. The initial grand jury testimony by William P. Masselli referred to in the *Report* at p. 507 "[*GRAND JURY MATERIAL DELETED.*]."

5. The interview of William P. Masselli by agents of the Special Prosecutor on May 17, 1982, referred to in the *Report* at pp. 507-511.

6. The follow-up grand jury testimony (Immunized) by William P. Masselli referred to in the *Report* at pp. 91, 229, 511, 674 "[*GRAND JURY MATERIAL DELETED.*]."

7. Any grand jury testimony by William P. Masselli or interviews of him by agents of the Special Prosecutor relating to May 20, 1977 lunch with Joseph DiCarolis and Gennaro Liguori, referred to in the *Report* in Exhibit 83.

8. Any grand jury testimony by William P. Masselli or interviews of him by agents of the Special Prosecutor relating to June 21, 1977 lunch with Joseph DiCarolis at Prudenti's, referred to in the *Report* in Exhibit 83.

9. The grand jury testimony by Joseph Bugliarelli referred to in the *Report* at p. 508 ftnt. 392 "[*GRAND JURY MATERIAL DELETED.*]."

10. The interview of Albert J. Magrini by agents of the Special Prosecutor on February 26, 1982, referred to in the *Report* at pp. 540-541.

11. The grand jury testimony by Albert J. Magrini referred to in the *Report* at p. 541 "[*GRAND JURY MATERIAL DELETED.*]."

12. The interview of Joseph A. DiCarolis by agents of the Special Prosecutor on January 15, 1982, referred to in the *Report* at pp. 130-131, 153, 542-548.

13. The grand jury testimony by Joseph A. DiCarolis referred to in the *Report* at pp. 60, 131, 387, 473,

548, 572, 598, 662 "[*GRAND JURY MATERIAL DELETED.*]."

14. Any grand jury testimony by Joseph A. DiCarolis or interviews of him by agents of the Special Prosecutor relating to May 20, 1977 lunch with William Masselli and Gennaro Liguori, referred to in the *Report* in Exhibit 83.

15. Any grand jury testimony by Joseph A. DiCarolis or interviews of him by agents of the Special Prosecutor relating to June 21, 1977 lunch at Prudenti's with Jopel owners, referred to in the *Report* in Exhibit 83 and at p. 148.

16. The interview of Morris J. Levin by agents of the Special Prosecutor on January 27, 1982, referred to in the *Report* at pp. 551-554.

17. The grand jury testimony by Morris J. Levin referred to in the *Report* at p. 554 "[*GRAND JURY MATERIAL DELETED.*]."

18. The interview of Robert DeFilippis by agents of the Special Prosecutor on April 2, 1982, referred to in the *Report* at pp. 671-672.

19. The grand jury testimony by Robert DeFilippis referred to in the *Report* at p. 558 "[*GRAND JURY MATERIAL DELETED.*]."

20. The interview of Vincent Marino by agents of the Special Prosecutor on May 11, 1982, referred to in the *Report* at p. 559.

21. The grand jury testimony by Vincent Marino referred to in the *Report* at pp. 559, 595 "[*GRAND JURY MATERIAL DELETED.*]."

22. The interview of Edward Garofola by agents of the Special Prosecutor on May 19, 1982, referred to in the *Report* at pp. 559-560.

23. The grand jury testimony by Edward Garofola referred to in the *Report* at p. 560 "[*GRAND JURY MATERIAL DELETED.*]."

24. The interview of Joseph Galiber by agents of the Special Prosecutor on June 4, 1982, referred to in the *Report* at p. 560-561.

25. The grand jury testimony by Joseph Galiber referred to in the *Report* at p. 561 "[*GRAND JURY MATERIAL DELETED.*]."

26. The grand jury testimony (Immunized) by Philip Buono referred to in the *Report* at pp. 561, 592, "[*GRAND JURY MATERIAL DELETED.*]."

27. The interview of Gennaro Liguori by agents of the Special Prosecutor on June 3, 1982, referred to in the *Report* at pp. 561-562.

28. Any grand jury testimony by Gennaro Liguori or interviews of him by agents of the Special Prosecutor relating to May 20, 1977 lunch with William Masselli and Joseph DiCarolis referred to in the *Report* in Exhibit 83.

29. The interview of Raymond Donovan by agents of the Special Prosecutor on January 18, 1982, referred to in the *Report* at pp. 566-568.

30. The interview of Raymond Donovan by agents of the Special Prosecutor on May 28, 1982, referred to in the *Report* at pp. 497, 593, 594, 595, 596.

31. The grand jury testimony by Raymond Donovan referred to in the *Report* at pp. 568, 593, 594, 595, 597 "[*GRAND JURY MATERIAL DELETED.*]."

32. Any grand jury testimony by Raymond Donovan or interviews of him by agents of the Special Prosecutor relating to discussions he had with Joseph DiCarolis about DiCarolis' lunch at Prudenti's with Jopel

owners on June 21, 1977, referred to in the *Report* in Exhibit 83 and at p. 148.

33. Any grand jury testimony by Ronald Schiavone or interviews of him by agents of the Special Prosecutor relating to discussions he had with Joseph DiCarolis about DiCarolis' lunch at Prudenti's with Jopel owners on June 21, 1977, referred to in the *Report* in Exhibit 83 and at p. 148.

34. The interview of Mario Montuoro by agents of the Special Prosecutor on January 8, 1982, referred to in the *Report* at pp. 219 ftnt. 158 *et seq.*, 220, 221.

35. The information from detectives assigned to the Bronx District Attorney's Office to the Department of Labor concerning Mario Montuoro, referred to in the *Report* as S.P. no. 150270 and referred to at p. 222 ftnt. 171.

36. The contents of allegations by a journalist on July 21, 1982, concerning Alfred DiTraglia, referred to in the Supplemental Report of the Special Prosecutor (*Supplemental Report*) at pp. 28-29 "[*MATERIAL DELETED.*]."

37. The grand jury testimony (Immunized) by Alfred DiTraglia referred to in the *Supplemental Report* at p. 31 "[*GRAND JURY MATERIAL DELETED.*]."

38. The interview of Louise Friscia by agents of the Special Prosecutor on August 12, 1982, referred to in the *Supplemental Report* at pp. 31-33.

39. The grand jury testimony by Joseph Verlezza on September 3, 1982.

It is FURTHER ORDERED, by the Court, that Leon Silverman, the former Special Prosecutor, be authorized to furnish to the District Attorney of Bronx County, New York, copies of any or all of the above enumerated investigatory records

procured or generated during his investigation that the District Attorney of Bronx County, New York, deems necessary.

It is FURTHER ORDERED, by the Court, that the District Attorney of Bronx County, New York, shall not make any disclosure of the contents of these records except to a duly constituted grand jury in Bronx County, New York, and such government personnel as are deemed necessary by the District Attorney of Bronx County in the performance of his duty to investigate and present evidence before a grand jury and to enforce the laws of the State of New York.

Per Curiam

For the Court:

/s/ GEORGE A. FISHER

George A. Fisher, *Clerk*

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division for the Purpose of
Appointing Special Prosecutors
Ethics in Government Act of 1978

In Re: Secretary of Labor
Raymond J. Donovan

September Term 1981
No. 81-2

ORDER

Upon the application of Stephen R. Bookin, Assistant District Attorney, Bronx County, New York,

It is hereby ORDERED that Leon Silverman, the former Special Prosecutor, be authorized to furnish to the District Attorney of Bronx County, New York, copies of the following investigatory records procured or generated during his investigation:

1. Grand jury proceedings on April 23, 1982 contained on pages 3869, 3879-3883, 3890-3901, 3903-3924, 3929-3932 of the official transcript (William Masselli).

2. Grand jury proceedings on February 4, 1982 contained on pages 582-608, 678-679, 681-682 of the official transcript (Joseph DiCarolis).

3. Grand jury exhibits 29, 30, 31, 32, 33, 34, 35, 36, and 37 referred to before the grand jury on February 4, 1982 and noted on pages 621, 625, 628, 629, 630, 631, 632 of the official transcript (Joseph DiCarolis).

4. Grand jury proceedings on May 20, 1982 contained on pages 5379-5391 of the official transcript (Jack Napoli).

5. Grand jury proceedings on May 20, 1982 contained on pages 5578-5579 of the official transcript (Morris Levin).

6. Grand jury proceedings on February 3, 1982 contained on pages 438-445 of the official transcript (Mario Montuoro).

7. Grand jury proceedings on February 3, 1982 contained on pages 475-491, 523-524, 535-539 of the official transcript (Ronald Schiavone).

8. Grand jury proceedings on May 11, 1982 contained on pages 4816-4817, 4846, 4937-4942, 4967-4969 of the official transcript (Raymond Donovan).

9. Grand jury proceedings on May 28, 1982 contained on pages 6151-6163, 6167-6169 of the official transcript (Raymond Donovan).

10. Interview of Raymond Donovan by agents of the Special Prosecutor on May 10, 1982.

11. Grand jury proceedings on February 17, 1982 contained on pages 1698-1701 of the official transcript (Gennaro Liguori).

12. Grand jury proceedings on March 4, 1982 contained on pages 2525, 2664-2669 of the official transcript (Carter).

13. Grand jury proceedings on March 10, 1982 contained on pages 2895, 2927-2928, 2931-2935 of the official transcript (Louis Nargi).

14. Grand jury proceedings on May 5, 1982 contained on pages 4538, 4541-4542 of the official transcript (Ronald Schiavone).

15. Grand jury proceedings on June 3, 1982 contained on pages 6381-6426 of the official transcript (Louis Sanzo).

16. Grand jury proceedings on May 13, 1982 contained on pages 5055-5060 of the official transcript (Vincent Marino).

It is further ORDERED that the District Attorney of Bronx County, New York, shall not make any disclosure of the contents of these records except to a duly constituted grand jury in Bronx County, New York, and such government personnel are deemed necessary by the District Attorney of Bronx County in the performance of his duty to investigate and present evidence before a grand jury and to enforce the laws of the State of New York.

Per Curiam

For the Court:

/s/ GEORGE A. FISHER

George A. Fisher, *Clerk*

DATED: Washington, D.C.
July 30, 1984

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division for the Purpose of
Appointing Special Prosecutors
Ethics in Government Act of 1978

In Re: Secretary of Labor
Raymond J. Donovan

September Term 1981
No. 81-2

ORDER

Upon the application of Stephen R. Bookin, Assistant District Attorney, Bronx County, New York,

It is hereby ORDERED that Leon Silverman, the former Special Prosecutor, be authorized to furnish to the District Attorney of Bronx County, New York, copies of the following investigatory records procured or generated during his investigation:

1. Grand jury exhibit 120, consisting of 63 pages, each entitled "Sub-contractor's estimate", dated June 6, 1979 through April 30, 1982.

It is further ORDERED that the District Attorney of Bronx County, New York, shall not make any disclosure of the contents of these records except to a duly constituted grand jury in Bronx County, New York, and such government personnel as are deemed necessary by the District Attorney of Bronx County in the performance of his duty to investigate and present evidence before a grand jury and to enforce the laws of the State of New York.

Per Curiam

For the Court:

DATED: Washington, D.C.
August 17, 1984

/s/ GEORGE A. FISHER
George A. Fisher, *Clerk*

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division for the Purpose of
Appointing Independent Counsel
Ethics in Government Act of 1978

In Re: Secretary of Labor
Raymond J. Donovan

Index No. 81-2

AFFIDAVIT

PAUL J. CURRAN, being duly sworn, deposes and states:

1. I am a member of the law firm of Kaye, Scholer, Fierman, Hays & Handler, co-counsel with Washington, D.C. law firm of Pierson, Ball & Dowd for United States Secretary of Labor Raymond J. Donovan. I am a member of the New York bar and am admitted to practice before the United States Court of Appeals for the District of Columbia Circuit.

2. I submit this affidavit in support of the instant motion of Raymond J. Donovan for an order (a) vacating four prior orders of this Court which granted applications of the Bronx County District Attorney's office for disclosure of grand jury testimony and other grand jury materials, and (b) directing the return to this Court of all the grand jury materials previously disclosed to the Bronx County District Attorney. The grounds for this motion are that this Court had no jurisdiction to issue such orders, and that the four applications were made and the four orders were entered in gross violation of the express provisions of Rule 6(e) of the Federal Rules of Criminal Procedure, which exclusively governs release of such grand jury materials.

Background Facts

3. On January 20, 1981 President Ronald Reagan nominated Raymond J. Donovan for the position of Secretary of Labor, and on February 3, 1981, after extensive hearings on his qualifications, the United States Senate confirmed his nomination. On February 4, 1981 Mr. Donovan was sworn in as Secretary of Labor.

4. Before becoming Secretary of Labor Mr. Donovan was Executive Vice President of Schiavone Construction Company, Inc. ("SCC"). He had been employed by SCC, a New Jersey Corporation that has been engaged in the heavy construction business in New Jersey, New York, and elsewhere within the United States. After he became Secretary of Labor Mr. Donovan resigned from SCC, and since then he has had no involvement in that Company's internal business affairs.

5. SCC is sponsor and operator of a joint venture ("SIC"), which in 1975 was successful low bidder on a large construction job for the New York City Transit Authority. This joint venture began its work in March, 1976, and in March, 1978 the work was expanded, and SIC, being again low bidder, was also awarded this job. The cost of this fixed price contract was funded approximately 80 per cent by the federal government pursuant to the Urban Mass Transportation Act of 1964, as amended, 49 U.S.C. §§ 1601-1613.

6. Beginning in 1977 federal regulations required, as a condition for continued federal funding of such contracts, that grant recipients like the New York City Transit Authority, see to it that contractors take steps to use minority business enterprises in a certain per cent of their construction work. The New York City Transit Authority promulgated rules for such minority participation and the joint venture, which SCC operates, complied scrupulously with those rules governing minority business participation in the construction work. One of the several minority business enterprises with which SIC sub-contracted in 1979 for work on this job, was Jopel Construction &

Trucking Co., Inc. ("Jopel"). SIC has performed this sub-contract in full compliance with all federal laws and regulations governing its operation, and the sub-contract is legitimate in all respects.

7. On or about December 29, 1981 the United States Department of Justice, at the request of Secretary Donovan, applied to this Court for the appointment of a Special Prosecutor pursuant to the provisions of the Ethics in Government Act, 28 U.S.C. § 591, to investigate whether Secretary Donovan had violated any federal criminal laws. This Court designated Leon Silverman, Esq. as Special Prosecutor.

8. Early in 1982, Special Prosecutor Silverman began presenting evidence to a Federal Grand Jury in the Eastern District of New York. He and that Grand Jury, supported by a great number of attorneys and investigators, examined numerous allegations concerning SCC and Secretary Donovan. The Grand Jury sat for more than four months and heard the testimony of 156 witnesses. On June 25, 1982, Special Prosecutor Silverman reported that the Grand Jury had unanimously determined that it had found no basis for any federal criminal indictment of Secretary Donovan.

9. On June 28, 1982, Special Prosecutor Silverman released to the public a comprehensive report (redacted version) consisting of four volumes and approximately 1025 pages, including exhibits.

10. Secretary Donovan testified before the Grand Jury on May 11, 1982, was interviewed under oath by Special Prosecutor Silverman on August 29, 1982, and was questioned by Special Prosecutor Silverman in other informal interviews. Six other SCC officials were also interviewed by Special Prosecutor Silverman and testified before the Grand Jury.

11. One of the central focuses of Special Prosecutor Silverman's investigation was the relationship between Jopel and SIC and the extent of Secretary Donovan's association with William Masselli.

12. Special Prosecutor Silverman's inquiry explored the Section 5B Contract and the subcontract between Jopel and SIC in great detail.

13. Special Prosecutor Silverman's thorough investigation of this Jopel matter unearthed no evidence of federal crimes, and no charges against Secretary Donovan, SCC, or anyone else were brought.

14. On August 29, 1984, Stephen Bookin, Assistant District Attorney for Bronx County, New York, telephoned Secretary Donovan's counsel and invited Secretary Donovan to testify voluntarily under a waiver of immunity before a Bronx County grand jury which Mr. Bookin stated had, for over one year, been investigating three areas, the murder of one Salvatore Frascone, the formation of Jopel, and Jopel's relationship with SCC and the TA, including certain quarterly reports filed with the TA by SCC.

15. On August 31, 1984, Mr. Bookin met with William O. Bittman, one of Secretary Donovan's counsel, at Mr. Bookin's office in the Bronx.

16. Mr. Bookin refused to tell Mr. Bittman whether or not Secretary Donovan was being viewed as a witness or as a target before the grand jury. He also refused to explain meaningfully the facts under investigation or to advise Mr. Bittman which New York State penal statutes were the basis of the investigation. Mr. Bookin said that the grand jury's investigation was 99 per cent complete and that Special Prosecutor Silverman's investigation concerning Secretary Donovan and Jopel had not been thorough enough.

17. On September 24, 1984 Secretary Donovan waived immunity and testified voluntarily for more than four hours before the Bronx County grand jury. He was not questioned about any larceny or the *bona fides* of Jopel as a minority business enterprise. On the same day, just after Secretary Donovan testified, the grand jury returned a 137 count, 73-page indictment against Secretary Donovan, SCC, Jopel, seven

SCC officials or former officials, and Jopel's two principal stockholders, Joseph Galiber and Mr. Masselli. The indictment includes one count of larceny, eleven counts of filing false reports and 125 counts of falsifying business records. The indictment charges Secretary Donovan with commiting 74 felonies after he became Secretary of Labor, beginning on February 13, 1982, and continuing through September 24, 1984, the date of the indictment.

This Court's Lack of Jurisdiction and Violations of Rule 6(e) of the Federal Rules of Criminal Procedure.

18. After this indictment was filed it became apparent that the Bronx County District Attorney's office's "case" against Secretary Donovan and his co-defendants was predicated virtually *in toto* upon the thorough investigation of the very same matters which Mr. Silverman had conducted. This apparently included use in the Bronx County grand jury of federal grand jury testimony and other grand jury materials obtained during the course of Mr. Silverman's investigation. Mr. Silverman conducted his investigation in 1982 before a grand jury in the Eastern District of New York.

19. In the course of counsel's investigation into this matter I discovered that the Bronx County District Attorney's office had made applications to and obtained disclosure orders not from the Eastern District of New York as Rule 6(e) requires, but rather from this Court. Accordingly, in order to discover the full extent of these disclosures, co-counsel for Mr. Donovan moved this Court on October 22, 1984 for the record of these applications and orders, and on November 19, 1984 this Court granted that application.

20. On November 21, 1984 I received from Mr. Silverman copies of four such applications and orders:

a) November 1, 1982 application of James F. Shalleck granted by Order of November 12, 1982;

b) October 27, 1983 application of Stephen R. Bookin granted by Order of February 27, 1984;

c) July 5, 1984 application of Stephen R. Bookin granted by Order of July 30, 1984;

d) August 10, 1984 application of Stephen R. Bookin granted by Order of August 17, 1984.

21. I have reviewed these documents, and it is plain that both the applications and the orders are illegal.

22. The sole authority which this Court posseses to release any grand jury materials at all is set forth in 28 U.S.C. § 595(a)(3). That subsection authorizes this Court to release only "such portions of a report made under this subsection as the division (this Court) deems appropriate." This Court has no statutory or other authorization to order the wholesale release of grand jury testimony and the related grand jury materials, which the Bronx District Attorney sought and this Court's four orders granted. Indeed, the grand jury testimony disclosed was not a part of the Special Prosecutor Silverman's report. For this reason alone the four orders must be vacated.

23. In addition, assuming *arguendo* the application could meet the mandatory threshold tests (which, as we demonstrate both below and in our memorandum of law, it did not and could not meet), Rule 6(e)(3)(D) mandates that applications for disclosure of grand jury testimony "*shall* be filed in the district where the grand jury convened" (emphasis added). Here, the grand jury convened in the Eastern District of New York, and the Bronx District Attorney's failure to apply to that Court constitutes a clear-cut and gross violation of law.

24. Even if, however, the Bronx District Attorney had applied to the proper Court, his applications are clearly defective. For example, he made no showing whatsoever that the applications were made "preliminarily to or in connection with a judicial proceeding" that bears any resemblance to the prosecution brought against Secretary Donovan and others. Even if

such a showing had been made, the requisite showing of "compelling necessity" or "particularized need" was not even attempted.

25. Further, Rule 6(e)(3)(D), at least with respect to the three applications filed in 1984, was squarely violated by the *ex parte* nature of these applications. The rule expressly provides that such *ex parte* applications may only be made by the government, and this of course means the federal government. The Bronx County District Attorney failed to "serve written notice of the petition" upon either Secretary Donovan or, insofar as we can tell, anyone else except Mr. Silverman, who was no longer in office. Astonishingly, the Department of Justice itself received no such notice. As a consequence of this illegality, Secretary Donovan and others affected were not able even to be heard. Had such notice been given, as the law requires, Secretary Donovan could, of course, have alerted this Court in advance to all of these manifest illegalities.

26. Beyond the foregoing violations of Rule 6(e) it is also apparent that the Bronx District Attorney's office did not deal squarely and truthfully with this Court in all of its applications for disclosure. Thus, in his affidavit of August 10, 1984 in support of disclosure of a 63 page Grand Jury Exhibit (No. 120), Stephen R. Bookin swore to this Court that this grand jury material was "necessary in the conduct of the investigation into the murder of Salvatore Frascone and the motive for the murder." This sworn statement was misleading in what it said and false in what it failed to say. Indeed, its falsity is evident from the face of affidavits which Mr. Bookin and Bronx County District Attorney Merola submitted on July 31, 1984, ten days earlier, to the United States District Court for the Southern District of New York. Mr. Bookin's affidavit to the Southern District runs some 25 pages, and Mr. Merola's is 3 pages. Both were submitted in support of an application for an order to use certain communications intercepted in accordance with 18 U.S.C. § 2510 *et seq*.

27. In these July 31, 1984 affidavits Messrs. Merola and Bookin swore, *inter alia*, that they had "probable cause to believe that William P. Masselli, Joseph Galiber, Jopel Contracting and Trucking Corporation, Joseph Di Carolis, Morris Levin, Richard Callaghan, and Schiavone Construction Company committed the offenses of Grand Larceny in the Second Degree, Falsifying Business Records in the First Degree, Tampering with Public Records in the First Degree, and Offering a False Instrument for Filing in the First Degree." (Merola affidavit, pages 1-2; Bookin affidavit, page 15). None of these matters was brought to this Court's attention in Mr. Bookin's subsequent affidavit of August 10, 1984 which he filed with this Court. This deceit may well constitute a contempt of this Court, and it is additional compelling evidence of the Bronx District Attorney's offices' failure to observe lawful procedures as well as a lack of good faith in its applications to this Court.

28. I submit with this affidavit and motion a memorandum of law which further demonstrates why these four orders must be vacated and why the grand jury testimony and related grand jury materials, which are covered by these orders, must be returned by the Bronx District Attorney to this Court.

29. This affidavit and motion as well as the accompanying memorandum of law are submitted *in camera*. A copy of the motion, this affidavit, and the memorandum of law has been served upon the Bronx County District Attorney as well as upon Mr. Silverman.

30. The criminal charges filed in Bronx County against Secretary Donovan and others have been pending for almost two months, and counsel must file certain motions to dismiss against those charges by November 30, 1984. For this reason and because the interests of justice require it a prompt ruling on the instant motion by this Court is of critical importance.

Accordingly, an expedited hearing is respectfully and urgently requested.

/s/ PAUL J. CURRAN
Paul J. Curran

Sworn to before me
this 26th day of November, 1984

/s/ MARIE FERRARA
Notary Public

MARIE FERRARA
Notary Public, State of New York
No. 24-4797251
Qualified in Kings County
Certificate Filed in New York County
Commission Expires March 30, 1985